IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

HARRINGTON REALTY, INC. t/a ERA HARRINGTON REALTY, Plaintiff, v. LIBERTO DEVELOPMENT, LTD., Defendant.	: : : : : : : : :	C.A. No. 05-06-0071

Decision after Trial

Trial: April 4, 2006

Decided: April 7, 2006

Judgment is entered for the Defendant.

Bradley S. Eaby, Esquire, Barros, McNamara, Malkiewicz & Taylor, P.A., Post Office Box 1298, Dover, Delaware 19903, Attorney for Plaintiff.

Kevin M. Howard, Esquire, Young, Malmberg & Howard, P.A., 502 South State Street, Dover, Delaware 19901, Attorney for Defendant.

Trader, J.

In this civil action Harrington Realty (Harrington) seeks to recover from Liberto Development (Liberto) a real estate broker's commission for the sale of Lot 83 in Church Creek, Magnolia, Delaware. I hold that there was no exclusive written listing agreement covering the Church Creek property. I further hold that the contract was cancelled because of the failure of the buyers to comply with the "must sell" addendum. Accordingly, judgment is entered for the defendant.

The relevant facts are as follows: An exclusive listing agreement was signed by Harrington and Liberto on April 12, 2004 whereby Liberto agreed to pay Harrington a 5% broker's commission on property located at Quail Landing on Cypress Branch Road, Dover, Delaware. (Plaintiff's Exhibit A). This listing agreement did not refer to property located in Church Creek Development. There were subsequent modifications of the original agreement, but none of these modifications referred to Church Creek. On June 21, 2004, Harrington obtained Robert Martino and Janice Martino (buyers), who signed a contract of sale in the amount of $216,300.00 for the purchase of Lot 83 in Church Creek Development. (Plaintiff's Exhibit F). The contract was contingent upon the buyers selling their current home and obtaining mortgage financing. The contract also provided that Liberto reserved the right to cancel the sales agreement upon giving the purchaser a written forty-eight hour notice of the seller's intention to accept another contract from a third party on the subject property. The purchasers must then remove the "must sell" contingency as well as any contingency relating to mortgage financing. Otherwise the agreement would become void forty-eight hours after the receipt of the seller's notice to the purchaser.

On July 21, 2004, the parties agreed to terminate the listing agreement on Church Creek and Quail Landing, but any sale in process would be honored by Liberto. (Plaintiff's Exhibit I). On July 26, 2004, Candance Cantrell, agent of Harrington, gave notice to Jim Wirick, agent for the buyers, that the buyers must remove the "must sell" addendum and return it to Liberto. Initially, the buyers agreed to remove the "must sell" contingency, but they did not agree to remove the mortgage contingency. Although Liberto sent a second written notice to the buyers on September 3, 2004 concerning the removal of the "must sell" contingency, the buyers did not respond to the first notice within forty-eight hours as required by the contract. On September 23, 2004, Liberto sent a letter to the buyers refunding any deposit money paid on the contract and thereafter Harrington filed a civil action in this Court to collect a commission from Liberto on the sale of the property.

Liberto contends that there is no written listing agreement for the sale of lots in the Church Creek Development. I agree. The written listing agreement covers the Quail Landing subdivision, but it does not mention the Church Creek development. The subsequent modifications (Plaintiff's Exhibits B and C) do not mention Church Creek and the testimony of the parties indicated that the modifications refer to Quail Landing.

It has been held that Regulation IX.A of the Rules of the Delaware Real Estate Commission requires that all listing agreements be in writing. *Eastern Commercial Realty Corp. v. Fusco*, 654 A.2d 833 (Del. 1995). The requirement that listing agreements be in writing prohibits the enforcement of an oral listing. *Id.* at 836. The requirement of the regulation that listing agreements be in writing is because oral listing agreements can be an unsafe practice and the requirement of writing helps to foster fair

dealings between parties, standardize real estate practice, prevent fraud, and avoid litigation. *Amato and Stella Assoc.'s v. Florida North Investments*, 678 F. Supp. 445, 448 (D. Del.1988) (citing *Green Mountain Realty v. Fish*, 336 A.2d 187, 188 (Vt. 1975)).

It is clear that neither the original leasing agreement nor subsequent modifications cover the Church Creek property. There is no written document that refers to the Church Creek property except the termination agreement between the parties. An exclusive listing agreement relative to the Church Creek property was sent to Liberto by Harrington and this document was never executed by Liberto. (Defendant's Exhibit K). Furthermore, I conclude that the parties never had a meeting of the minds on the commission to be charged for the sale of the Church Creek property, and that the sale of each house was negotiated between the parties. Defendant's Exhibit L, an email from Doug Doyle to Liberto, supports this conclusion. Therefore, there was not only the absence of a written listing agreement, but there was also no oral agreement between the parties concerning the sale of the Church Creek property. Hence, it follows that Harrington is not entitled to recover a commission.

Liberto also contends that since the buyers breached the contract, Liberto was justified in terminating the contract. I agree.

The "must sell" addendum to the contract is as follows:

> However, Seller reserves the right to cancel this Agreement at any time during the term thereof upon giving the Purchaser a written 48 hour notice of their intention to accept another contract from a third party on subject property.
>
> Purchaser will then have the right to remove this "must sell" contingency provided that the Purchaser simultaneously removes any contingencies related to mortgage financing, otherwise this Agreement will become void 48 hours (excluding weekends and legal holidays) after receipt of Seller's notice to Purchaser as set forth above and all

> deposits held by Liberto Development as a deposit on Property will be returned to Purchaser in full without interest…. Immediately upon the removal of this "must sell" contingency, Purchaser shall make an additional deposit of $1,000.00 to be applied towards the purchase price.

Liberto sent a notice to the buyers' agent on July 26, 2004 requiring the removal of the "must sell" provision. At that time, Liberto had a buyer willing to purchase Lot 83. The buyers agreed to remove the "must sell" addendum but they wanted to keep the mortgage contingency. The buyers' agent, Jim Wirick, attempted to negotiate a resolution whereby the buyers would retain the mortgage contingency, but Liberto would not agree to the retention of the mortgage contingency. Although Liberto sent the buyers a second notice to remove the "must sell addendum" on September 3, 2004, the buyers did not respond to the first notice within 48 hours as required by the contract. The failure of the buyers to remove the contingencies within 48 hours of the receipt of the notice results in the termination of the contract. Hence, there was no contract in existence from which Harrington was entitled to a commission.

At trial, Harrington asserted that recovery should be permitted on a theory of *quantum meruit*. It is true in that *Chabbott Petrosky Commercial Realtors v. Peterson*, 859 A.2d 77 (Del. 2004), the Delaware Supreme Court permitted recovery on a *quantum meruit* basis. The case is factually distinguishable from the case before me. In *Chabbott*, there was an oral modification of a written agreement, as well as a long term lease that recognized the broker's right to a commission, but in the case before me, there was no written listing agreement. Additionally, the legal theory set forth in the complaint was breach of contract. The legal theory of *quantum meruit* was not set forth in either

Harrington's complaint or in the pretrial stipulation. Therefore, I cannot permit Harrington to assert this theory at trial.

Based on these findings of fact and conclusions of law, judgment is entered on behalf of defendant for the costs of these proceedings.

IT IS SO ORDERED.

Merrill C. Trader
Judge